RE: ESTATE OF TEOH CHEOW CHOON; *EX PARTE:* KHOR HONG LUANG

HIGH COURT MALAYA, PENANG
TUAN VINCENT NG KIM KHOAY J.
[ORIGINATING SUMMONS NO. 24-330-94]
12 AUGUST 1994

PROBATE AND ADMINISTRATION: Grant of Probate with Will annexed - Transfer of property to beneficiaries named in Will - Leave of Court - Vesting order - Whether executor thereof required leave of Court to transfer property - Whether vesting order ought to be applied for - Whether application for vesting order unwarranted and superflous - National Land Code s. 420 - Probate and Administration Act 1959 s. 60 - Trustees Act 1949 ss. 48, 50, 51, 52, 55, 57 & 58.

This was an application by the executrix and trustee of the estate of one Teoh Cheow Choon for an order that a piece of land in Mukim 9, Daerah Seberang Perai Selatan, Negeri Pulau Pinang, be vested according to the shares and in favour of the beneficiaries named in the Will of the deceased. Apparently, the Land Administrator in this case had refused to effectuate the transfer of the said land to the beneficiaries without a vesting order from the Court, a procedure which seemed to have become a standing practice among Land Administrators in Penang, and which the legal practitioners, all the while, seemed to have obliged. Before the learned Judge, the primary issue that arose was whether, bearing in mind that Grant of Probate with Will annexed had been issued to the executor, and bearing in mind too the provisions of s. 60(3) of the Probate and Administration Act 1959, the application by the executrix herein was unnecessary and superflous.

Held:

[1] It is trite law that there is no necessity for an executor to apply for leave to transfer land unless what he intends to effect goes against any restrictions in the Will of the deceased. Under s. 60(4) Probate and Administration Act, only an administrator is required to do so.

[2] An executor, being a person appointed by the testator to execute the Will, has the task of distributing the estate as directed by the Will which he does through his capacity as trustee of that estate. Since the executor takes his powers from the testator himself, s. 60(3) Probate and Administration Act 1959 provides that he may, without leave of the Court, charge, mortgage or otherwise dispose of all or any property of the deceased as he may think proper, subject to any restriction in the Will, in which case he may only do so with leave of the Court. In the premises, to carry out his duties thus, an executor who has with him a Grant of Probate with Will annexed, like the executrix in the present case, need not make any application either for leave or vesting order. Such application is wholly unnecessary, superflous and unwarranted.

[3] Section 420 of the National Land Code merely prescribes that no order of the Court vesting alienated land or any share or interest therein in any person or body shall affect the land, share or interest in question until it has been registered pursuant to that section, and nothing more. There is nothing in this provision which could be construed as permitting the executor or administrator to seek vesting orders. Hence, it is improper for either an executor or an administrator to apply for a vesting order.

Per Curiam

In the event the Registrar or the Land Administrator refuses to register the distribution of the aforesaid respective shares in favour of the beneficiaries as per the Will of the deceased due to the absence of a vesting order , then the applicant could appeal to this Court under s. 418 of the National Land Code. The Court may then, under s. 417 of the Code, direct the Registrar or any Land Administrator to give effect to any judgment or order made pursuant to the appeal thereof.

[Application dismissed].

Cases referred to:
Brownrigg v. Pike [1882] 7 PD 61-64
Re Wells [1968] 1 WLR 44

Legislation referred to:
National Land Code, ss. 417, 418, 420
Probate and Administration Act 1959, s. 60(3), (4)
Trustee Act 1949, ss. 48(a) to (h), 50, 51, 52, 54, 55, 57, 58, 60(4)

Other sources referred to:
Swinb, Pt. 4, s. 2, pl. 2

For the applicant - Ooi Teik Hoe; M/s. Ooi Lee & Co.

JUDGMENT

Vincent Ng Kim Khoay J:
This was an *ex parte* application by the applicant for an order that a piece of land held under Suratan Hakmilik Sementara H.S. (D) 1500 for Lot No. PT 003769 in Mukim 9, Daerah Seberang Perai Selatan, Negeri Pulau Pinang (the said land) be vested according to the shares and in favour of the beneficiaries named in the will of the deceased named Teoh Cheow Choon.

The affidavit of the applicant dated 12 April 1994 (Encl. 1) filed on 13 April 1994 in support of the Saman Pemula (Encl. 2) states as follows:

1. The applicant was the executrix and trustee for the estate of Teoh Cheow Choon (the deceased).
2. The said deceased died on 31 December 1976 and the Grant of Probate had been issued by the Penang High Court *vide* Probate No. 365 of 1977.
3. The said deceased died, possessed of and entitled to the whole of the undivided share of the said land.
4. Pursuant to paragraph 4 of the Last Will and Testament of the deceased dated 3 December 1976, the deceased had bequeathed the said land to the following names:

   (i) Khor Hong Luang
   (I/C No. 2557589)
   Deceased's wife ... 2/11 shares.

   (ii) Teoh Chin Seng
   (I/C No. 2557510)
   Deceased's son ... 2/11 shares.

(iii) Teoh Chin Kwang
(I/C No. 2555928)
Deceased's son ... 2/11 shares.

(iv) Teoh Chin Hua
(I/C No. 4044239)
Deceased's son ... 2/11 shares.

(v) Teoh Tong Giap
(I/C No. A 0877959)
Deceased's son ... 2/11 shares.

(vi) Teoh Tong Keat
(I/C No. 6781031)
Deceased's grandson ... 1/11 shares.

5. The applicant has paid the debts, funeral expenses and estate duty for the said land.

6. There is no minority interest in the estate of the deceased.

7. In this premises, the applicant prays for order in terms for the application.

This application by an executor for a vesting order - unfortunately, a common phenomenon in many High Courts in the country on any given chamber day in a Court fixture - was misconceived for being unwarranted and wholly superfluous. The application stems from a common misconception among lawyers here about the purpose of a vesting order which, among its repertoire of reliefs, the Court is empowered to give in dispensing justice; a misconception which, incidentally, has also revealed a manifest failure on the part of a law practitioner to appreciate the markedly different powers and role of executors on the one hand and administrators on the other (both commonly referred to as personal representatives) of the deceased's estate.

It has been the common practice of lawyers to apply to Courts for vesting orders in cases where the personal representatives of an estate have taken out Probate or Letters of Administration. In cases where an applicant is issued with the Grant of Letters of Administration he should only apply to the Court for leave to distribute but never, a vesting order, whereas an executor who is armed with a Grant of Probate with Will annexed need not make any such application either for leave or vesting order. Such wholly unnecessary applications *(albeit ex-parte)* by executors for vesting orders only clutters the Court's already heavy Chamber list and should not only be strongly disapproved but dismissed by the Court.

An administrator is a person who obtains his authority solely from the grant of Letters of Administration and to whom representation of the deceased is committed by the Court in default of an executor. His office resembles that of an executor but, since he has not been selected by the deceased, he is, in general, obliged to give a bond with sureties for the due performance of his duties which (in regard to immovable property) he could perform only with the sanction of the Court, by way of an application for leave to distribute or transfer. As he derives his authority and powers only from the Court, s. 60 (4) of the Probate and Administration Act 1959, provides that he cannot without previous permission of the Court:

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property situated in any Stated and for the time being vested in him; or

(b) lease any such property for a term exceeding five years.

a An executor is the person appointed by the testator to execute the Will. And as such, he is not required to give a bond or to provide sureties for the due performance of his duties. "To appoint an executor," says Swinburne, "is to place one in the stead of the testator, who may enter to the testator's goods and chattels, and who hath action against the testator's debtors, and who may dispose of the same goods and chattels, towards payment of the testators debts, and performance of his will". See Swinb, Pt. 4, s. 2, pl. *b* 2; *Brownrigg v. Pike* [1882] 7 PD 61-64 and *Re Wells* [1968] WLR 44. Subsequent to the probate and estate duty formalities he has the task of distributing the estate as directed by the Will. He does this in his other capacity as trustee. As he takes his powers from the testator himself, s. 60(3) of the Act provides that he may, without leave of the Court, charge, mortgage or otherwise dispose of all or any property of the deceased as he may think proper, subject to any restriction in the Will of the deceased; and if there is such *c* restriction he may only do so with leave of the Court.

When the question was posed by me to Counsel for the applicant in the current application, as to why the need to apply for a vesting order, the reply was that the authorities in the Land Registries (in the State of Penang) had refused to register the transfer to the beneficiaries of the estate without a vesting order from the Court. Perhaps, the Registrar or Land Administrator may have been lulled into the position of *d* unwarranted expectation in consequence of the common practice of lawyers, when making their presentation to Land Registries of transfers to beneficiaries named in the Will, also to forward vesting orders to accompany same. Indeed, so common has been such applications for vesting orders by personal representatives of estates, that it has come to the Court's knowledge that there are unqualified persons going round the Courts in Penang rendering their services to this end for a fee. I am further informed *e* by one of my interpreters that, following my dismissal of several vesting-order applications, a character (not a lawyer) had emerged from the shadows to enquire after the grounds of the Court's dismissal. It is interesting to note that, according to some senior lawyers, perhaps the real purpose of seeking a vesting order is to avoid paying Government revenue through short-cutting certain registration procedures in Land Registries.

f

Vesting orders are primarily applicable only to matters e.g. application by survivors of joint tenants or beneficiaries of indentures of devolution and under the Trustee Act 1949 (Revised 1978), rather than under the Probate and Administration Act 1959 (Revised 1978). Vesting orders are available in applications under the Trustee Act 1949, as follows: in trust situations spelt out under s. 48(a) to (h); under s. 50, on vesting orders *g* in place of conveyance by minor in case of a trustee under disability; under s. 51, on vesting orders consequential on order for sale of land; under s. 52, on vesting orders consequential on judgment for specific performance of a contract or for sale or exchange of any interest in land; under s. 55, on vesting orders as to stock or a thing in action; under s. 58, on vesting orders of charity or society property in land, stock or thing in action; and under s. 57, on vesting orders in relation to minor's beneficial interest in any *h* property (movable or unmovable) for maintenance, education or benefit of the minor. And s. 54 provides that in any of the above applications under the Trustee Act, the Court may, if it is more convenient when making a vesting order, appoint a person to convey the land or interest therein.

An application for a vesting order is rarely a correct procedure to adopt in Probate and *i* Administration cases except in cases where e.g. it is uncertain who is (or there is no) personal representative of a deceased trustee or a deceased chargee. To recap, it is trite

law that there is no necessity for the executor to apply for leave to transfer land unless what he intends to effect goes against any restrictions in the Will of deceased. Only an administrator is required under s. 60(4) of the Probate and Administration Act to apply for such leave.

Most importantly, it is improper for either an executor or an administrator to apply for a vesting order. Section 420 of the National Land Code merely prescribes that no order of the Court vesting any alienated land or any share or interest therein in any person or body shall affect the land, share or interest in question until it has been registered pursuant to that section, and nothing else. This provision contains nothing which could be construed as permitting the executor or administrator to seek vesting orders.

In the event, I dismissed the said application by the applicant and on the same morning I also dismissed another similar application under O.S. 24-213-94 (In the matter of Grant of Probate under Petition No. 32-62-92) and a few others in subsequent weeks, including O.S. 24-399-94 (In the matter of Grant of Probate under Petition No. 32-166-93) which was dismissed on 19 July 1994 on the same grounds herein. However, in cases where applications were by administrators of estates, they were granted after due amendment at the instance of the Court (i.e. the application for vesting order was amended to read as the application for leave of Court to distribute and transfer).

In dismissing the present application I had also directed that in the event the Registrar or Land Administrator refuses to register the distribution of the aforesaid respective shares in favour of the beneficiaries as per the Will of the deceased due to the absence of a vesting order, then the applicant could appeal to this Court under s. 418 of the National Land Code. The Court may then, under s. 417 of the National Land Code, direct the Registrar or any Land Administrator to give effect to any judgment or order made pursuant to the appeal under s. 418 of the National Land Code.